No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-457

F. DAVID MATHEWS, Secretary of Health, Education, and Welfare, APPELLANT

v.

WILL WEBSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

WILLIAM KANTER,
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Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Cases—Continued

Constitution and statutes:

Constitution and statutes—Continued

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OPINION BELOW

The opinion and order of the district court (App. A, *infra*) is reported at 413 F. Supp. 127.

JURISDICTION

The order of the district court, which held former 42 U.S.C. 415(b)(3) unconstitutional, was entered on May 5, 1976 (App. B, *infra*). A notice of appeal to this Court was filed on June 1, 1976 (App. D, *in-*

fra). On July 23, 1976, Mr. Justice Blackmun extended the time for docketing this appeal to and including August 30, 1976. On August 20, 1976, Mr. Justice Marshall further extended the time for docketing this appeal to and including September 29, 1976. Jurisdiction is conferred on this Court by 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763, n. 8; *McLucas* v. *De Champlain*, 421 U.S. 21, 31-32.

QUESTIONS PRESENTED

1. Whether former Section 215(b) of the Social Security Act invidiously discriminated against retired male wage earners by providing that the Secretary, in calculating old-age insurance benefits based on a wage earner's average monthly wage during the years of his highest earnings, must take into consideration three more years of earnings for males than for females.

2. Whether Congress invidiously discriminated against older retired male wage earners by providing that the amendments to Section 215(b) that eliminated the difference in treatment of male and female retirees should be applied prospectively only.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

The relevant provisions of Sections 202(a) and 215(b) of the Social Security Act, 49 Stat. 623, as amended, 42 U.S.C. 402(a) and 415(b), are reproduced at App. E, *infra*. That appendix also contains a description of Section 215(a) of the Act and sets forth the relevant provisions of former Section 215 (b)(3) and the provisions implementing the 1972 amendment, Section 104(j), 86 Stat. 1341 (Social Security Amendments of 1972).

STATEMENT

1. This case involves the constitutionality of the statutory scheme adopted by Congress for computing Social Security old-age insurance benefits. Under Section 215 of the Social Security Act, 42 U.S.C. 415, such benefits are determined on the basis of the wage earner's "average monthly wage" earned during his "benefit computation years," which are the "elapsed years" (reduced by five) during which the wage earner's covered wages were highest. The number of "elapsed years," until a 1972 amendment to the statute, depended upon the sex of the wage earner. Section 215(b)(3) of the Act prescribed that the number of "elapsed years" for a male wage earner would be three higher than for an otherwise similarly situated female wage earner; for a male, the number of "elapsed years" equalled the number of years that elapsed after 1950 and before the year in which the male attained age 65; for a female, the number of "elapsed years" equalled the number of years that elapsed after 1950 and before the year in which the

female attained age 62. Thus a male wage earner born in 1900 would have had 14 "elapsed years" upon retirement at age 65, whereas a female wage earner born in the same year would have had 11 "elapsed years" upon her retirement at that age.

As a consequence of this method of determining "elapsed years," a female wage earner could exclude from the computation of her "average monthly wage" three lower earnings years that a similarly situated male wage earner would be required to include. The exclusion of those three lower earnings years would result in the determination of a slightly higher "average monthly wage," and a correspondingly higher level of monthly old-age benefits, for the retired female wage earner.

Congress eliminated this distinction in 1972. The amendment, however, generally applied only to men who reached or will reach age 62 after the effective date of the amendment.[1]

2. Appellee is a retired male wage earner who reached age 62 in 1971. In 1974, at age 65, appellee applied for old-age insurance benefits, and his "average monthly wage" and benefits were computed under

[1] Congress ordered that the change be phased in over a three-year period. Men who reached age 62 in 1973 counted the number of years to age 64; men who reached age 62 in 1974 counted the number of years to age 63; men who reached age 62 in 1975 or would reach it thereafter counted only the number of years to age 62.

the old formula (App. A, *infra*, pp. 1a-2a). Had the Secretary calculated appellee's benefits under the new formula, which by its terms was inapplicable to appellee, or had appellee been a woman instead of a man, his benefits would have been somewhat higher.

Appellee requested that the more favorable formula be used to compute his benefits. After a hearing, the administrative law judge denied this request, and the Appeals Council of the Social Security Administration affirmed (*id.* at 2a-3a). Having exhausted his administrative remedies, appellee then brought this action for review in the United States District Court for the Eastern District of New York under Section 205(g) of the Social Security Act (*id.* at 1a).[2]

The district court held the statutory scheme, as applied to appellee, unconstitutional on two grounds. First, the court determined that to give women who reached age 62 before 1975 greater benefits than men of the same age and earnings record was irrational, reasoning that any system that favored female wage earners over male wage earners, for the purpose of compensating them for past employment discrimination, must be "tailored to the grievances of specific individuals" (App. A, *infra*, p. 5a). The court expressed the view that "[i]n amending the

[2] The single-judge district court was authorized to entertain the constitutional challenge in this case. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 and n. 8; *Flemming* v. *Nestor*, 363 U.S. 603, 606-608.

statute [in 1972] Congress recognized, tacitly or otherwise, the lack of rational basis for the unequal treatment of two individuals solely because of sex" (App. A, *infra*, p. 4a), and stated that "Congress now having recognized its mistake, in all fairness this Court should follow Congress' lead * * *" (App. A, *infra*, p. 4a).

Second, the court held that the 1972 amendments must be applied retroactively since, the court determined, it was irrational to give men who reach age 62 in 1975 or later a benefit not extended to older men (App. A, *infra*, pp. 5a-6a).

Although the court held two aspects of the statutory scheme unconstitutional, as to the alleged sex discrimination the court apparently concluded that the 1972 amendment, if applied retroactively to appellee, would afford him sufficient relief: the court ordered that appellee be awarded old-age insurance benefits each year computed on the basis of the most favorable formula then applicable to men rather than on the basis of the formula applicable to women.[3]

THE QUESTION IS SUBSTANTIAL

The decision below, if applied uniformly, would require the Secretary to pay enormous amounts of money over the next several years to men who reached age 62 before 1975. Preliminary actuarial estimates

[3] Thus, appellee's 1974 benefits are to be calculated on an age 63 formula. Later benefits are to be calculated on the age 62 formula that applies to both men and women from 1975 on. See note 1, *supra*.

are that application of the district court's holding to all of the approximately nine million retired male wage earners would result in added costs of $1.9 billion per year between 1977 and 1981, $1.8 billion per year between 1982 and 1983, and additional significant amounts each year until all beneficiaries who had reached age 62 before 1975 had died.[4]

In view of the relief awarded by the district court, which in essence extended to appellee the favorable treatment of the 1972 amendment to Section 215(b)(3) but during the phase-in period did not grant him full parity with a similarly situated retired female wage earner, it is uncertain whether the court's statements about sex discrimination were in the nature of *dictum* or constituted a holding that provided additional support for the award of relief. Because of that uncertainty, we find it necessary here to raise and discuss both the question of sex discrimination and that of the validity of the nonretroactivity of the 1972 amendments.

But the importance of this case would not be diminished if only the second of those questions is viewed as ripe for decision. The old-age insurance

[4] In addition, if these men were to receive back benefits for the years 1973 to 1976, $4.5 billion more would be due. However, the doctrine of sovereign immunity would seem to prohibit the award of such retrospective relief. See *United States* v. *Testan*, 424 U.S. 392; *Edelman* v. *Jordan*, 415 U.S. 651; *Tatum* v. *Mathews*, C.A. 6, Nos. 75-1695 and 75-1696, decided September 2, 1976; *Johnson* v. *Mathews*, C.A. 8, Nos. 75-1297 and 75-1345, decided June 15, 1976; *Townsend* v. *Edelman*, 518 F.2d 116 (C.A. 7).

benefits payable to men and women who reach age 62 after 1975 will be computed on the basis of the same formula. Accordingly, from and after 1975, retired male wage earners in appellee's position would receive the same benefits whether determined on the basis of the most favorable formula applicable to men or on the basis of the formula applicable to women. Thus the prospective fiscal significance of this case is the same whether both issues, or only that relating to the 1972 amendment, are determined by this Court to be present.

1. The decision of the district court to strike down the statutory scheme established under former Section 215(b) cannot be squared with previous decisions of this Court and represents "a degree of judicial involvement in the legislative function which [this Court has] eschewed except in the most unusual circumstances * * *." *Weinberger* v. *Salfi*, 422 U.S. 749, 773. As this Court observed in *Salfi*, insofar as "the validity of Congress' Social Security classifications" is concerned, " 'the Due Process clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification' " (422 U.S. at 768). This Court has also recognized that it is neither arbitrary nor irrational to create legislative distinctions that compensate for previous disadvantages incurred by women. See *Schlesinger* v. *Ballard*, 419 U.S. 498, 508; *Kahn* v. *Shevin*, 416 U.S. 351.

The Social Security Act, prior to the 1972 amendments, provided that a woman with the same earnings record as a man would get slightly higher old-age insurance benefits. This Court has recognized, however, that a woman with the same skills, education and experience as a man typically would earn less over her working life, both because she would not get equal pay for equal work and because she would not be able to get as good a job. See *Frontiero* v. *Richardson*, 411 U.S. 677, 684; *Kahn* v. *Shevin*, *supra*, 416 U.S. at 353-354. Since Social Security benefits correspond to average wages, it is reasonable to allow women a more favorable formula for computing their average monthly wage in order to remedy at least part of the inequality that pertained during their working lives.[5]

Congress may also consider the likelihood that older women have less favorable employment prospects than older men and thus may have fewer working years from which the peak earnings years could be selected. Cf. *Kohr* v. *Weinberger*, 378 F. Supp. 1299, 1302, n. 5 (E.D. Pa.), vacated on other grounds, 422 U.S. 1050. Permitting the calculation of average monthly income over a smaller number of elapsed years ameliorates that disparity.

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[5] The remedy has by no means proved complete. "As of December 1972, the *average* monthly retirement insurance benefit for males was $179.60 and for females, $140.50." *Polelle* v. *Secretary of Health, Education, and Welfare*, 386 F. Supp. 443, 444 (N.D. Ill.) (emphasis in original).

The fact that some women may have suffered no occupational or economic disadvantage does not mean that the statutory scheme is invalid. Contrary to the district court's suggestion (App. A, *infra*, p. 5a) that remedial measures must be "tailored to the grievances of specific individuals," Congress does not act invidiously "merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78." *Dandridge* v. *Williams*, 397 U.S. 471, 485. It would be impractical, indeed impossible, for Congress to fashion a statute designed to remedy the specific employment discrimination suffered by each individual wage earner covered by the Social Security Act; there is no constitutional requirement that Congress do either the impossible or nothing at all.

Furthermore, the decision by Congress in 1972 to eliminate the difference in treatment does not mean that it "recognized, tacitly or otherwise, the lack of rational basis for the unequal treatment" (App. A, *infra*, p. 4a). In recent years Congress has legislated to reduce the economic disparity between men and women through the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), and Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. 2000e-2 (a), (b) and (c). "These Congressional reforms may well have lessened the economic justification for the more favorable benefit computation formula in § 215

(b)(3)." *Kohr* v. *Weinberger*, *supra*, 378 F. Supp. at 1305. Thus Congress could reasonably conclude that, as to the future, the problem of employment discrimination would be met directly and therefore that the retirement age adjustment could be eliminated prospectively. The district court's holding suggests, however, that Congress acts to eliminate possibly outmoded statutory classifications at the peril of having the classification therefore held unconstitutional on that account.

2. Congress' decision to apply the 1972 amendment to Section 215 prospectively only was not irrational and did not violate the Due Process Clause.[6] Congress need not make changes in social welfare programs retroactive. *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160. Consistent with the principles of equal protection, Congress may alter social welfare programs one step at a time. *Dandridge* v. *Williams*, 397 U.S. 471.

The line drawn by Congress in 1972 is reasonable. Since a change to an age 62 formula raises the benefits to those entitled to use that formula, the incremental cost is significant. The decision to make the change prospective only saves almost $2 billion a year, thus reducing the drain on the Trust Fund (see *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 780), and also avoids the administrative burden of recom-

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[6] One court has said that the "argument that making this amendment non-retroactive denies equal protection borders on the frivolous." *Polelle* v. *Secretary of Health, Education, and Welfare*, *supra*, 386 F. Supp. at 444, n. 4.

puting benefits for eight million men already receiving old-age insurance benefits when the amendment passed.

3. The constitutionality of Section 215(b) has been upheld by four courts against attack on equal protection grounds. *Gruenwald* v. *Gardner*, 390 F.2d 591 (C.A. 2), certiorari denied, 393 U.S. 982; *Kohr* v. *Weinberger*, *supra*; *Polelle* v. *Secretary of Health, Education, and Welfare*, *supra*; *McEvoy* v. *Weinberger*, CCH Unemployment Insurance Reporter ¶ 17,414 (S.D. Fla., August 28, 1973).[7] Three of the four cases were decided after the 1972 amendments and also after the decision of this Court in *Frontiero* v. *Richardson*, *supra*.[8] The district court noted (App. A, *infra*, p. 5a) that other courts had sustained the constitutionality of Section 215(b), but it declined to follow the reasoning of those cases. As a result, appellee has received favored treatment over all other retired male wage earners who have litigated the question.

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[7] The courts in both *Polelle* and *McEvoy* held that the classification satisfied a compelling interest of the government in reducing the effects of past discrimination.

[8] The exception, *Gruenwald* v. *Gardner*, *supra*, was cited favorably in the plurality opinion in *Frontiero*, 411 U.S. at 689, n. 22.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

WILLIAM KANTER,
Attorney.

SEPTEMBER 1976.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75 C 377

WILL WEBSTER, PLAINTIFF

—against—

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

OPINION AND ORDER

May 3, 1976

PLATT, D.J.

Defendant moves pursuant to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings on the ground that plaintiff has failed to state a claim upon which relief can be granted.

In this action plaintiff seeks to review the final decision of the defendant on the question of the amount of retirement insurance benefits payable to him under Title II of the Social Security Act (42 U.S.C. § 401, *et seq*). He brings this suit pursuant to Section 205(g) of such Act, as amended (42 U.S.C. § 405(g)).

Plaintiff was born on January 19, 1909, and two days after he attained 65, on January 21, 1974, he

applied for social security benefits and was awarded $185.70 per month. This award was based on an eighteen year (216 months) social security earnings record.

Plaintiff claims that all single women born on the same date with the same earnings record applying for benefits at the same time would have been awarded $204 per month based on a fifteen year (180 months) social security earnings record.

Plaintiff claims further that Congress recognized this inequality or "sex discrimination" by changing the law in 1972 to conform the benefit computation formula for men to the one used for women at the time of retirement but (i) did not make such change retroactive so as to benefit him and other males similarly situated and (ii) thereby further discriminated against him and such other persons.

In 1974 plaintiff, being dissatisfied with the determination of the amount of his monthly benefits, requested reconsideration which resulted in an affirmance of the original decision. Plaintiff then sought and obtained a hearing before an Administrative Law Judge who held that an administrative law proceeding was "not a suitable or proper forum for adjudication of constitutional claims" and that his proper forum was "the United States District Court".* The

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* Plaintiff's complaint is a constitutional attack on a federal statutory provision, and at first blush it might appear that a three-judge court should be convened pursuant to 28 U.S.C. § 2282 to consider his claims. But the Supreme Court has indicated that suits brought pursuant to 42 U.S.C. § 405(g) are not suits for general injunctive relief, and that single judges should hear such suits, see *Weinberger* v. *Salfi*, 422 U.S. 749, 763 and n. 8 (1975); *Flemming* v. *Nestor*, 363 U.S. 603, 606-07 (1960); *Coffin* v. *Secretary of Health, Education & Welfare*, 400 F.Supp. 953, 959 (D.D.C. 1975), *appeal filed*, 44 USLW 3375 (U.S. Nov. 25, 1975) (No. 75-765); *Jablon* v. *Secretary of Health, Education & Welfare*, 399 F.Supp. 118, 121 (D. Maryland 1975), *appeal filed*, 44 USLW 3364 (U.S. Nov. 18, 1975) (No. 75-727).

Appeals Council of the defendant denied review of this decision on January 28, 1975, and the same became final on that date.

The defendant here says that this question has been decided by the Court of Appeals for this Circuit in *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968), which held that there was "a reasonable relationship between the objective sought by the classification, which is to reduce the disparity between the economic and physical capabilities of a man and a woman—and the means used to achieve that objective in affording to women more favorable benefit computations", and that there was "nothing arbitrary or unreasonable about the application of the principle underlying the statutory differences in the computations for men and women," 390 F.2d at p. 592.

In reaching such decision, however, the Court of Appeals was not confronted by plaintiff's argument that the statute involved here carried a double discrimination, i.e., a sex discrimination and a date of birth discrimination in that had he been born some three years later he would have received for the rest

of his life equal treatment with his female counterparts.

In amending the statute Congress recognized, tacitly or otherwise, the lack of rational basis for the unequal treatment of two individuals solely because of sex. This is in accordance with and is consistent with such prior Congressional enactments as Title VII of the Civil Rights Act of 1964, Pub.L.No. 88-352, 78 Stat. 241 (1964), and the Equal Pay Act of 1963, Pub.L.No. 88-38, 77 Stat. 56 (1963). It is also consistent with the original purposes and design of the Social Security Laws which for more than a generation contained no provisions which discriminated on the basis of sex. It was not until 1956 that such type of discrimination crept into the Act and gave rise to the type of problem with which we are now confronted.

Congress now having recognized its mistake, in all fairness this Court should follow Congress' lead, and we find that there is no longer (if there ever was) any rational basis for drawing a distinction between males and females for the purposes of social security benefit computations such as are involved here.

We note that this conclusion is consistent with the trend since *Gruenwald* toward stricter scrutiny by the Courts of the supposed rational bases for statutes which make distinctions between the sexes. While it is not clear at this point which equal protection standard should be applied in analyzing such statutes, see *e.g.*, *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Waldie* v. *Schlesinger*, 509 F.2d 508, 510-11 (D.C. Cir.

1974); *Green* v. *Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973), it is clear that under even the least rigorous standard Congress may not "invidiously discriminate . . . on the basis of criteria which bear no rational relation to a legitimate legislative goal" in distributing social security benefits, *Weinberger* v. *Salfi*, 422 U.S. 749, 772 (1975). No legitimate legislative purpose has been shown for the double discrimination practices against plaintiff and those in his position under the 1972 amendments to the Social Security Act.

We are aware that other Courts have examined the statutory scheme before us and upheld it as reasonable. Most notably, in *Polelle* v. *Secretary of Health, Education & Welfare*, 386 F.Supp. 443 (N.D. Ill. 1974) (three-judge court) and in *Kohr* v. *Weinberger*, 378 F.Supp. 1299 (E.D. Pa. 1974) (three-judge court), *vacated*, 422 U.S. 1050 (1975), it was held that Congress could establish benefit formulas more favorable to women to compensate for past wage discrimination against them. We agree with Judge McMillen's position, taken in his dissent in *Polelle*, that convincing evidence of such Congressional intent has not been shown, and we wish as well to indicate our uncertainty about the constitutional status of such "benign" discrimination when it is not tailored to the grievances of specific individuals as it was in *Acha* v. *Beame*, —— F.2d —— (2d Cir. Feb. 19, 1976), slip op. 2041, a Title VII case. But our major disagreement with those cases is that Congress has

done more in the challenged Social Security provisions than assist women. Congress has provided that all women and all men who reach age 62 after December 31, 1974 shall receive more favorable treatment than that accorded to men who were 62 before that date. Nowhere is it suggested how this arbitrary categorization is justified as compensation for past discrimination; nowhere is it suggested how this categorization promotes the ends of the Social Security Act. To segregate women and recently retired men from men who retired earlier for purposes of determining what future benefits shall be due * is, at least insofar as we have been shown, no more sensible than providing that retirees with blue eyes should receive benefits at a rate different from that for retirees with brown eyes. Such unjustified discrimination constitutes a violation of the Fifth Amendment.

For the foregoing reasons, defendant's motion for judgment on the pleadings must be and the same hereby is denied and, since there is no issue of fact to be tried, plaintiff must be awarded judgment on the pleadings. Accordingly, the defendant is directed to make payments to the plaintiff for each period of time after January 19, 1974, under that "benefit computation years" formula in effect in the period for any group of males that allows plaintiff the most

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* We understand plaintiff to make no claim concerning the higher benefits given to women and denied to all men before the effective date of the 1972 amendments to the Social Security Act.

favorable number of benefit computation years.** In other words, plaintiff will be paid for each period at the highest rate available to men with his employment record until such date as the most favorable formula for men is identical with the formula for women. From that date, of course, he is to be paid at the same rate as a woman in his situation.

SO ORDERED.

/s/ Thomas C. Platt
U.S.D.J.

** This somewhat complicated system is necessary because Congress chose in the 1972 amendments to the Social Security Act to bring the formulas for men and women together step by step over several years. Insuring that plaintiff is paid for each period under the most favorable formula available to any man will insure that he does not suffer from the double discrimination which is at issue in this case.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed in Clerks Office, U.S. District Court
E.D. N.Y., May 5, 1976]

WILL WEBSTER, PLAINTIFF

—against—

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

A memorandum and order of the Court, Honorable Thomas C. Platt, United States District Judge, presiding, having been filed on May 3, 1976, denying the defendant's motion for judgment on the pleadings and awarding judgment on the pleadings to the plaintiff and directing the defendant to make payment to the plaintiff for each period of time after January 19, 1974 at the highest rate available to men with his employment record until such date as the most favorable formula for men is identical with the formula for women at which date he is to be paid at the same rate as a woman in his situation, it is

ORDERED and ADJUDGED that the defendant make payments to the plaintiff for each period of time after January 19, 1974, under that "benefit computation years" formula in effect in the period for any group of males that allows plaintiff the most favorable number of benefit computation years.

Dated: Brooklyn, New York
May 4, 1976

/s/ Lewis Orgel
Clerk

by /s/ Thomas Bloosteller
ch. Deputy Clerk

Approved:

/s/ Thomas C. Platt
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 377

WILL WEBSTER, PLAINTIFF

—against—

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

ORDER

Defendant, by his attorney, DAVID G. TRAGER, United States Attorney for the Eastern District of New York, David W. McMorrow, Assistant United States Attorney, of counsel, having moved by notice of motion dated May 17, 1976, together with an Affidavit dated May 17, 1976, and a Supplemental Affidavit dated June 2, 1976, for an order staying the Judgment entered herein, and said motion having come before the court on the 4th day of June, 1976, and Will Webster, plaintiff *pro se*, having appeared in opposition to the motion, and the Court having heard argument with regard to said motion on June 4, 1976, and upon all the papers and proceedings heretofore had herein and upon due deliberation, it is

ORDERED, that the operation of the Judgment entered herein on May 5, 1976 be, and the same hereby is, stayed until such time as the United States

Supreme Court has made its final disposition of the within action.

Dated: Brooklyn, New York
June 8, 1976

/s/ Thomas C. Platt
THOMAS C. PLATT
United States District Judge

A TRUE COPY ATTEST

June 9, 1976

LEWIS ORGEL, Clerk

By /s/ Mary Anne Grist, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 377

WILL WEBSTER, PLAINTIFF

—against—

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant Secretary of Health, Education and Welfare, hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252 and 2101, from the Opinion and Order entered in this action on May 3, 1976, and the judgment entered in this action on May 5, 1976.

Dated: Brooklyn, New York
June 1, 1976

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant,
Secretary of Health,
Education and Welfare
225 Cadman Plaza East
Brooklyn, New York
11201

By: /s/ Paul B. Bergman
PAUL B. BERGMAN
Chief, Appeals Division

TO:

Will Webster
Plaintiff *Pro Se*
27 Horseshoe Drive
Northport, New York 11768

APPENDIX E

Applicable Statutes

Section 202(a) of the Act, 42 U.S.C. 402(a) provides in part:

> Every individual who—
>
> (1) is a fully insured individual (as defined in section 414(a) of this title),
>
> (2) has attained age 62, and
>
> (3) has filed application for old-age insurance benefits * * *
>
> shall be entitled to an old-age insurance benefit * * *. [S]uch individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.

Section 215(a) of the Act, 42 U.S.C. 415(a), sets out a table for determining the primary insurance amount. This amount is based on an individual's "average monthly wage" as defined in Section 215(b) of the Act, 42 U.S.C. 415(b).

Before it was amended in 1972, Section 215(b) of the Act, 42 U.S.C. 415(b) provided in part:

> (1) * * * [A]n individual's "average monthly wage" shall be the quotient obtained by dividing—
>
> (A) the total of his wages paid in and self-employment income credited to his "benefit computation years" (determined under paragraph (2)), by

> (B) the number of months in such years.
>
> (2) (A) The number of an individual's "benefit computation years" shall be equal to the number of elapsed years (determined under paragraph (3) of this subsection), reduced by five; except that the number of an individual's benefit computation years shall in no case be less than two.
>
> (B) An individual's "benefit computation years" shall be those computation base years, equal in number to the number determined under subparagraph (A), for which the total of his wages and self-employment income is the largest.
>
> (C) For purposes of subparagraph (B), "computation base years" include only calendar years in the period after 1950 and prior to the earlier of the following years—
>
> (i) the year in which occurred * * * the first month for which the individual was entitled to old-age insurance benefits, or
>
> (ii) the year succeeding the year in which he died.
>
> * * * * *
>
> (3) For purposes of paragraph (2), the number of an individual's elapsed years is the number of calendar years after 1950 * * * and before—
>
> (A) in the case of a woman, the year in which she died or, if it occurred earlier but

after 1960, the year in which she attained age 62.

* * * * *

(C) in the case of a man who has not died, the year occurring after 1960 in which he attained (or would attain) age 65.

Subsection 215(b)(3) was amended in 1972 by Pub. L. 92-603, Section 104(b), 86 Stat. 1340. It now reads in pertinent part:

(3) For purposes of paragraph (2), the number of an individual's elapsed years is the number of calendar years after 1950 * * * and before the year in which he died, or if it occurred earlier but after 1960, the year in which he attained age 62.

The amendment went into effect as follows, Pub. L. 92-603, Section 104(j), 86 Stat. 1341:

(j)(1) The amendments made by this section * * * shall apply only in the case of a man who attains (or would attain) age 62 after December 1974. * * *

(2) In the case of a man who attains age 62 prior to 1975, the number of his elapsed years for purposes of section 215(b)(3) of the Social Security Act [42 U.S.C. 415(b)(3)] shall be equal to (A) the number determined under such section as in effect on September 1, 1972, or (B) if less, the number determined as though he attained age 65 in 1975, except that monthly benefits under title II of the Social Security Act for months prior to January 1973 * * * shall be determined as though this section had not been enacted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 220576 308